UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

THE PENNSYLVANIA CYBER CHARTER SCHOOL

Employer

and

Case 06-RC-120811

PA CYBER SCHOOL EDUCATION ASSOCIATION, PSEA/NEA Petitioner

ORDER

The Regional Director directed an election among the Employer's full-time and regular part-time virtual classroom instructors. The Employer requests review, asserting that the Regional Director erred in finding that it was not an exempt political subdivision under Section 2(2) of the Act. We deny review.

Under the test of *NLRB v. National Gas Utility District of Hawkins County*, 402 U.S. 600, 604-605 (1971), the Board will find entities to be exempt if they are "either (1) created directly by the state, so as to constitute departments or administrative arms of the government, or (2) administered by individuals who are responsible to public officials or to the general electorate." In *Chicago Mathematics & Science Academy*, 359 NLRB No. 41 (2012), a recent full-Board decision, we applied the *Hawkins County* test to determine whether a particular charter school established and operated under Illinois law constituted an exempt political subdivision. The Board found that the school was not exempt, but also stated that it was not creating "a bright-line rule that the Board has jurisdiction over entities that operate charter schools, wherever they are located and regardless of the legal framework that governs their specific relationships with state and local governments." Id., slip op. at 1.

Here, the Regional Director, correctly applying the *Hawkins County* test, carefully reviewed the particular circumstances of the Employer's creation, structure, and operation in light of the relevant legal framework in Pennsylvania. Contrary to our dissenting colleague, we find that the Employer has not raised any issue, whether factual or legal, that warrants review. As our colleague rightly acknowledges, there are "many similarities between this case and *Chicago Mathematics*." Further, insofar as our colleague suggests that the Board revisit its decision there, we see no compelling reason to do so.

Our colleague points to facts suggesting, in his view, that the Employer "may well have been 'created' by the state" of Pennsylvania. We are not persuaded that they support granting review. The *Hawkins County* test requires that an entity, to be exempt, must be "created *directly* by the state." 402 U.S. at 604-605 (emphasis added). The relevant entity here, as in *Chicago Mathematics*, is a nonprofit corporation created by private individuals. It may be that, absent the Pennsylvania Charter School law, the entity would not have been created, but that is not the relevant question under *Hawkins County* or *Chicago Mathematics*. No doubt many private entities would not exist but for the public contracts they carry out; they nevertheless are not "administrative arms of the government" (in the word of *Hawkins County*). See *Chicago Mathematics*, slip op. at 6.

That Pennsylvania arguably has chosen to cover charter-school employees under various laws governing public employees is also immaterial under *Chicago Mathematics*: the same was true of the charter school in that case, with respect to Illinois law. *Chicago Mathematics*, slip op. at 2 & fn. 3 (citing state laws applicable to charter schools, including Illinois Educational Labor Relations Act). Our colleague also points out that the Pennsylvania Charter School Law refers to charter schools and their trustees and administrators as "public school[s]" and "public officials." But the Regional Director correctly noted that while a state's "characteriz[ation of] charter schools as being within the public school system is 'worthy of careful consideration,'" such characterization is "not controlling in ascertaining whether an entity is a political subdivision." *Chicago Mathematics*, supra, slip op. at 7, citing *Hinds County Human Resource Agency*, 331 NLRB 1404 (2000).

In short, contrary to our dissenting colleague, we see no significant difference between this case and *Chicago Mathematics*. Here, the Regional Director correctly found that no local or state official was involved in the selection or removal of any members of the Employer's governing Board of Trustees, or in the hiring of the Employer's staff, including its CEO. He further found that neither the Employer's trustees nor its CEO are directly and personally accountable to any state or local public

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¹ The statute actually defines charters schools as being "*independent* public schools." Penn. Stat. Ann. Educ. Code § 17-703A (emphasis added).

² Penn. Stat. Ann. Educ. Code § 17-1715-A (11)-(12).

³ The state law in *Chicago Mathematics* was similar to that at issue here. The Illinois Charter Schools Law involved in that case characterized charter schools as being within the public school system and subjected charters schools to the jurisdiction of the Illinois Educational Labor Relations Act (IELRA). The IELRA, in turn, was amended to provide that the "governing body of a charter school" was included within the state's definition of a public "educational employer." *Chicago Mathematics*, supra, slip op. at 2 & fn. 3.

officials or to the general electorate. Under *Chicago Mathematics*, these findings are dispositive.⁴ Accordingly, we deny the Employer's request for review.

KENT Y. HIROZAWA, MEMBER

NANCY SCHIFFER, MEMBER

Dated, Washington D.C., April 9, 2014

MEMBER JOHNSON, dissenting.

I would grant review. Notwithstanding the many similarities between this case and *Chicago Mathematics & Science Academy*, 359 NLRB No. 41 (2012), on which the Regional Director's Decision and Direction of Election relies in substantial part, I believe it prudent for the full Board to reconsider its interpretation of the test for determining whether a public charter school is a political subdivision exempt from Section 2(2) of the Act, pursuant to *NLRB v. National Gas Utility District of Hawkins County*, 402 U.S. 600, 603-605 (1971)("Hawkins County").

First, the Employer here may well have been "created" by the state and thus be a subdivision under *Hawkins County*. Its charter was originally granted by public officials. after a hearing and by their own public vote, before any private entity was formed to operate the school. In my view, issuance of the charter before the private entity was created resulted in "creation" by the state. One of the operative statutes indicates the state did create the school as a matter of law, in that the Pennsylvania Department of Education "act[s] on applications for the *creation* of a cyber charter school." Penn. Stat. Ann. Educ. Code §17-1741-A (emphasis added). Moreover, the Employer's charter renewal, necessary to "create" the school for another five year term, was signed by no less than the acting Pennsylvania Secretary of Education. Further supporting full consideration by the Board here, Pennsylvania state law defines the Employer as a "public school" – an entity traditionally seen as a political subdivision of a state. Most importantly, Pennsylvania has consciously chosen to cover charter school employees like the Employer with its own system of public employee laws relating to organizational and collective-bargaining rights, as well as a panoply of other laws applicable only to public schools, including state oversight of financial integrity. Second, the Employer may well also be a political subdivision for the independent reason that it is arguably "administered by individuals who are responsible to public officials." Hawkins County,

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⁴ Contrary to our dissenting colleague, we do not see renewal of a cyber school's charter by the Pennsylvania Secretary of Education as evidence that trustees are "responsible to public officials," in the sense contemplated by *Chicago Mathematics* and *Hawkins County*, any more than renewal of a government contract converts a private contractor into a public agency.

402 U.S. at 604-605. Pennsylvania's legal regime classifies the Employer's own board of trustees themselves as "public officials," with its Chief Executive Officer specifically covered by laws relating to public officials concerning ethics and disclosures. And, as mentioned above, the Employer can only exist if its charter is renewed, as it has been, by the Pennsylvania Secretary of Education. That the Secretary decides whether or not to renew the charter is dispositive evidence that the trustees are accountable to that public official. Full bore appointment of the trustees by the Secretary is not required under the test.

In conclusion, the Board's decision in *Chicago Mathematics & Science Academy* held that the Board would not apply a bright-line rule to the question of jurisdiction of charter schools. 359 NLRB No. 41 (2012), slip op. at 1. Thus, I would have the Board fully set forth its reasons for asserting (or not asserting) jurisdiction in this case, in order to develop the law in an area extremely important to states, schools, employees, parents and children alike.

HARRY I. JOHNSON, III, MEMBER